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IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. 624

WINTHROP TAYLOR,

Petitioner,

v.

JOSEPH P. MARCELLE, Collector of Internal Revenue, First District of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

OELAND & KUHN,
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Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Eastern District of New York. A transcript of the record of the case is furnished herewith in accordance with Rule 38 of this Court including the subsequent proceedings in the United States Court of Appeals appended hereto consisting of the order of affirmance of the judgment on the opinion of the District Court.

Jurisdiction

The statute under which jurisdiction is invoked is Title 28, United States Code, Section 1254.

Summary Statement of the Matter Involved

This action is one for the refund of part of a 1929 deficiency in income tax paid in excess of the amount of the deficiency properly due, the deficiency in tax paid, including interest, amounting to $108,842.12. The correct amount of the deficiency computed by the Treasury Department (in accordance with the factual decision of the Tax Court that a capital gain was realized) is $5,319.89. The amount sought to be refunded is the difference between the amount paid (plus interest from the various dates of payment) and the correct deficiency, as aforesaid, with interest thereon from March 15, 1930.

It is not questioned that the refund action in the District Court is timely and in all respects procedurally regular. The defendant collector moved for summary judgment dismissing the complaint on the ground that the action was barred as being *res judicata* because of the order of the United States Court of Appeals (then the Circuit Court of Appeals) affirming the deficiency as paid. The petitioner made a countermotion for summary judgment on the ground authorized by Section 322(c)(2) of the Internal Revenue Code providing for a refund of an

> "amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final",

with respect to which the essential facts were alleged *and admitted.*

The complaint alleges, and the answer *specifically admits*, the following:

> (a) Both the Revenue Bureau and the Commissioner, after examining the taxpayer's 1929 income tax return, verified and approved all the computations;
>
> (b) That the only reason stated by the Commissioner for the deficiency judgment was that the petitioner,

based upon the volume of the sales, was a stock-trader and that the amount of capital gain reported should be treated as ordinary income;

(c) That the appeal by the taxpayer to the Tax Board was from the aforesaid determination of the Commissioner;

(d) That the Tax Court specifically found that the taxpayer had realized profits from the sale of Public Service shares held for more than two years prior to sale but did not treat them as capital gains because it upheld the Commissioner's determination that the taxpayer was a stock-trader based upon the volume of sales.

(e) That the (then) Circuit Court of Appeals reversed the Tax Court with respect to the stock-trader theory but held that it was unable to decide that the particular Public Service shares, on which the capital gain was computed, had been held for more than two years prior to sale. The Court commented, however, that it was "unlikely" that such was not the case, that this aspect had been "left in the air" and that the result was "unsatisfactory"; the Court did not find that the plaintiff's computations were incorrect.

The original computation of the deficiency, based upon the stock-trader theory, was arrived at by disallowing any capital gain and treating the amount reported as such as ordinary income. This was correct but when the stock-trader theory was rejected by the Circuit Court, reversing the determination of the Tax Court in this respect, the factual decision of the Tax Court (admitted by the answer) to the effect that the petitioner had realized large profits from the sale of securities held for more than two years prior to sale, became controlling and such profits, obviously, were capital gains and any deficiency should have been computed accordingly, i.e., by applying the 12½% rate to such

gains. This was not done. The computation of the deficiency, as paid, treated all such gains as ordinary income. The Treasury Department recognized (admitted by the answer) the erroneous computation and determined the correct deficiency to be $5,319.89 by recomputing the same in accordance with the decision of the Tax Court that gains from the sale of securities held for more than two years had been realized, which, since the petitioner was held not to be a stock-trader, should have been treated as capital gains and taxed accordingly.

The opinion of the District Court, upon which affirmance by the Court of Appeals was exclusively based, conceded that there is no factual dispute, the essential facts having been alleged and admitted as aforesaid. It held, however, that the order of the United States Court of Appeals (then the United States Circuit Court) affirming the deficiency (although specifically reversing the Tax Court with respect to the stock-trader theory) was *res judicata*. The District Court based its decision exclusively upon the common law doctrine of *res judicata* and ignored the provisions of Section 322(c)(2) of the Internal Revenue Code authorizing an action for refund where the amount of the deficiency collected had not been computed in accordance with the decision of the Tax Court.

Questions Presented

(1) Are not the statutory provisions of Section 322(c)(2) of the Internal Revenue Code controlling and, as such, do they not supersede, with respect to actions for refund in income tax cases, the common law doctrine of *res judicata?*

(2) Does the doctrine of *res judicata* bar relief in a situation which does not involve any factual controversy, the essential facts, favorable to the taxpayer, having been admitted and there being no necessity for relitigation?

Reasons Relied On for Allowance of the Writ

The questions above presented are of public importance and involve issues of general law in the relations of the citizen and his government in conjunction with principles of fundamental justice in the correction of egregious error in the collection of taxes. Specifically the affirmance by the United States Court of Appeals of the judgment of the District Court upon the opinion of the latter by-passes the will of Congress as expressed in the enactment of Section 322(c)(2) of the Internal Revenue Code. Further the opinion of the District Court, upon which the United States Court of Appeals exclusively bases its affirmance, is in conflict with the doctrine of *res judicata* established by applicable decisions of this Court. This is particularly emphasized by the factual determination of the true deficiency by the Treasury Department, the real defendant, in favor of the petitioner made in the interest and course of just and fair administration of Federal taxation.

WHEREFORE your petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the United States Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court.

February, 1953.

WINTHROP TAYLOR,
Petitioner.

By WALTER R. KUHN,
Counsel for Petitioner.

IN THE

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OCTOBER TERM 1952

No. .....

WINTHROP TAYLOR,
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v.

JOSEPH MARCELLE, Collector of Internal Revenue, First District of New York.

BRIEF IN SUPPORT OF PETITION

Opinions Delivered in Courts Below

Taylor v. *Commissioner,* 76 Fed. 2d 904;
Taylor v. *Marcelle,* Collector, Decision and Opinion of U. S. District Court for Eastern District of New York, 97 F. Supp. 35, dated February 23, 1951.

Jurisdiction

Statute under which jurisdiction is invoked is Title 28, United States Code, Section 1254.

In accordance with Rule 38 of this Court it is believed that jurisdiction is sustained because of conflicts with decisions of this Court involving questions of general law of public importance in the interest of just and fair Federal tax administration and also as concerns the duty generally of Federal courts to give force and effect to Federal statutes.

Cases which enunciate the principle of granting writs where questions of public importance are involved are:

Magnum Import Company v. *De Spoturno Coty*, 262 U. S. 159, 163;

National Labor Relations Board v. *Waterman, S. S. Corporation*, 309 U. S. 206.

This application for a writ does not involve any factual review of evidence *all* the allegations of the petition having been admitted.

Statement of Case

The case, so far as material to the consideration of this application, is stated in the petition (pp. 2-5).

Specifications of Error

The errors which petitioner will urge if a writ of certiorari is granted are that the Court of Appeals for the Second Circuit erred in denying the petition for the following reasons:

(1) That due force and effect should have been accorded to Section 322(c)(2) of the Internal Revenue Code, authorizing the action for refund.

(2) That in any event, there being no factual dispute, the doctrine of *res judicata* does not apply.

POINT I

The Internal Revenue Code (Section 322(c)(2)) authorizes an action for refund "as to any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final."

Some weeks after the close of the hearing the Tax Board filed a decision which states it is "in accordance with the memorandum filed herewith" (pp. 21, 22, affidavit) in which the Board affirmed the determination of the Commissioner that the plaintiff was a stock-trader based upon the volume of the transactions (*paragraph "IX" of complaint, specifically admitted by paragraph "1" of answer*). The computation of the deficiency was properly sustained as this decision allowed no capital gain *because the plaintiff was held to be a stock-trader.*

However, the decision of the Tax Board *also* held that profits from the sale of Public Service shares held for more than two years prior to sale had been realized (*paragraph "XI" of complaint, specifically admitted by paragraph "1" of answer*). When the Circuit Court reversed the Tax Board that the plaintiff was a stock-trader because of the volume of the sales, any deficiency in tax should have been computed by taxing at 12½% Public Service profits realized from the sale of shares held over two years in accordance with the aforesaid decision of the Tax Board as modified by the Circuit Court's reversal with respect to the plaintiff being a stock-trader. This was not done. Obviously the error was made in adopting the amount of the original deficiency, correctly computed upon the basis that the plaintiff was a stock-trader, but when this basis no longer obtained any computation should have recognized as capital gain taxable at 12½% profits which the Tax Board decided had been realized from the

sale of shares held for more than two years. The Treasury Department admittedly recognized this fact in computing and determining the correct deficiency at $5,319.89. The difference between this determination and that which has been collected constitutes the excess which, under the applicable statute, should be refunded.

The District Court ignored the statute, making no reference to it in its opinion, and placed sole reliance for dismissal upon the common law doctrine of *res judicata*. The Court of Appeals affirmed exclusively on the opinion of the District Court. This is the basic error.

POINT II

In any event res judicata has no valid application because the rational basis for the doctrine does not exist under the circumstances disclosed by the Record.

In the broad sense and as a matter of principle the defense of *res judicata* including that of estoppel by former judgment have no application to this case. As the pleadings show, and as the District Court in its opinion stated:

> "There is no possible claim in this case that any question of fact exists" (p. 40 opinion District Court).

Any factual controversy which may have existed has long been put at rest by the official action of the Department of Justice and of the Treasury Department performed in the discharge of their public duties to the effect that (1) the deficiency judgment is fundamentally erroneous and (2) the correct deficiency is $5,319.89. The authenticity of such governmental action is not challenged, but, on the contrary, is unqualifiedly and specifically admitted by the defendant—in reality the Treasury Department, of which the Collector is the agent.

It is well settled that unless attacked affirmatively the acts of public officials carry the presumption of legitimacy and correctness with respect to matters within their jurisdiction and should be accepted as a proper exercise of the authority with which they are invested. *Lewis* v. *United States,* 279 U. S. 63; *Johnson* v. *State of Maryland,* 254 U. S. 51, 57; *Mullan* v. *United States,* 140 U. S. 240, 245; *Wilkes* v. *Dinsman,* 48 U. S. 89, 131. This is the same presumption which obtained in favor of the Treasury Department's (Commissioner's) original determination of the deficiency which, to overcome, the plaintiff was obliged to challenge. When the same official or department makes a different determination of the deficiency by modifying the same in favor of the plaintiff, the courts should be bound accordingly.

Based on the foregoing, there is nothing left to relitigate, a second bite of the cherry is not sought and no rehash of any issue is involved. In this respect the opinion of the District Court contains a contradiction which reflects the inherent fallacy of the decision. The opinion states that to overcome the plea of *res judicata* "would be to grant a new trial"—but the opinion correctly states that "there is no possible claim in this case that any question of fact exists" and that "there is no disputed issue of fact in the case". Such being the case, a "new trial" is not involved and hence there is no justification to invoke the rule of *res judicata.*

Legal scholars and courts are agreed that both in origin and application the doctrine of *res judicata* is essentially an expression of "public policy" involving "desirability to avoid and not to litigate" in order to "guard against double recovery, to give stability to judicial determinations, to relieve persons from multiple and vexatious litigation and in effect economize in the administration of justice" (Columbia Law Review, "Res Judicata", Volume 49 (1949), p. 647).

The doctrine of *res judicata* is invoked to "check litigious tendencies and to secure a measure of peace in the courts * * *" (Webster "Res Judicata" Lecture before the Association of the Bar of the City of New York, March 24, 1942). The doctrine of *res judicata* is one of public policy involving the economy of the time of courts (Moschzisker, Yale Law Review, Volume 38, p. 239). In an article, Yale Law Journal, January 1948, Volume 57, No. 3, entitled "Res Judicata Reexamined", the author (Professor Edward W. Cleary) states that the doctrine of *res judicata* was designed to prevent "vexatious litigation" and to conserve "economy of court time".

These views are reflected by the Supreme Court in the case of *Commissioner* v. *Sunnen*, 333 U. S. 591, the court stating:

> "The general rule of res judicata applies to *repetitious suits* involving the same cause of action. It rests upon consideration of *economy of judicial time* and public policy favoring the establishment of certainty in legal relations." (Emphasis supplied.)

These generic reasons for *res judicata* do not exist in the case at bar. The plaintiff is not seeking to litigate "needlessly", "vexatiously" or "repetitiously" any issue which has been tried, nor is the time of the court involved in a retrial. The correct deficiency as determined by the Treasury Department having been admitted by the defendant and accepted by the plaintiff, realistically and justly confers "finality", "peace", "certainty" and "repose". Under the circumstances, the ordering of a refund would not be violating any requirement of public policy or of principles of *res judicata*.

Since *res judicata* is a doctrine conceived not in the interests of "abstract justice" as between the parties but in expediency as a matter of social convenience, it follows that before the urgent and basic demands of justice are swept aside the practical grounds for expediency should

factually exist—as they do not exist in this case. Otherwise the exercise of the rule merely serves (Paul's "Studies in Federal Taxation," p. 143) "to perpetrate error" without any, even a theoretical, compensating advantage. Indeed, one Federal Judge (*United States* v. *C. C. Clarke, Inc.*, 159 Fed. 2nd 489) went considerably further in his comments:

> "It is more for the public good that the United States Government in its own courts should deal honorably with its taxpayers than that a few hours of court time should be saved."

In conclusion, it is submitted that in an action for the partial refund of a tax, where the defendant comes into court and admits that an excess has been paid, a plea of *res judicata* is artificial and meaningless.

CONCLUSION

It is respectfully submitted that the questions involve principles of general law of public importance and gravity with respect to just and fair imposition and collection of Federal taxes—such as to render appropriate, under the rules of this Court, a review of the decision of the Court of Appeals.

February, 1953.

Respectfully submitted,

OELAND & KUHN,
Attorneys for Petitioner,

By WALTER R. KUHN,
Counsel.

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In the Supreme Court of the United States

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No. 624

WINTHROP TAYLOR, PETITIONER

v.

JOSEPH P. MARCELLE, COLLECTOR OF INTERNAL REVENUE, FIRST DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 39-41) is reported in 97 F. Supp. 35. The *per curiam* order of affirmance of the Court of Appeals (R. 46-47) is reported in 199 F. 2d 759.

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1952. (R. 48.) The petition

for a writ of certiorari was filed on February 26, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

In 1934 the Board of Tax Appeals made an order determining a deficiency in taxpayer's income tax for 1929. In 1935, on taxpayer's appeal, the Court of Appeals affirmed the order of the Board. In 1944 the Court of Appeals denied a petition filed by taxpayer to review the 1935 judgment. Thereafter, taxpayer paid the Collector the amount of the deficiency.

The question now presented is whether the courts below erred in holding that on these facts the issue of taxpayer's liability for the 1929 tax deficiency had been finally adjudicated and that taxpayer's present suit brought in 1949 in the District Court for refund of the amount paid in satisfaction of the deficiency was barred.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Regulations are printed in the Appendix, *infra*, pp. 7-9.

STATEMENT

In 1949 taxpayer sued in the District Court for refund of $103,522.23 paid to the Collector for a deficiency in income tax for 1929, including interest, alleged to have been illegally collected. (R. 5-11.) After the Collector answered, setting up in affirmative defense that the issue raised in the complaint had already been finally adjudicated in the Board

of Tax Appeals and in the Court of Appeals and that the instant suit was barred (R. 13-15), both sides moved for summary judgment (R. 2-3, 40). The District Court granted the Collector's motion (R. 39-42), and dismissed the complaint. The Court of Appeals entered a *per curiam* order affirming the judgment on the opinion below. (R. 46-48.)

The relevant facts, which are not in dispute (R. 41), are these: On March 15, 1930, taxpayer returned and paid income tax for 1929 in the amount of $64,103.19. The Commissioner on September 17, 1932, determined that certain gains from the sale of corporate stock were not capital gains, as reported by taxpayer, but were taxable as ordinary income, and that taxpayer's return was deficient in the sum of $51,353.70. (R. 5-6, 13.) On November 3, 1932, taxpayer filed a petition with the Board of Tax Appeals for redetermination of the deficiency. (R. 6-7, 13.) After trial of the issues raised, the Board filed its memorandum decision (1934 P-H B.T.A. Memorandum Decisions, par. 34,310) on June 15, 1934, finding for the Commissioner on the merits, and entered an order sustaining the deficiency in the amount of $51,353.70, which, together with interest, was assessed against taxpayer on October 15, 1934 (R. 7, 14).

Taxpayer then appealed to the Court of Appeals for the Second Circuit, which on April 15, 1935, entered judgment affirming the order of the Board. (R. 7-8, 14.) *Taylor* v. *Commissioner,* 76 F. 2d

904. On October 14, 1935, this Court denied certiorari. (R. 14.) 296 U.S. 594.

Nearly ten years later, taxpayer in 1944 petitioned the Court of Appeals to review its 1935 order of affirmance. The Court of Appeals rejected this application, and this Court denied certiorari. (R. 40.) 324 U.S. 871.

Between July 17, 1945, and December 15, 1947, taxpayer paid to the Collector under protest the full amount of the deficiency thus determined, together with interest, aggregating $108,842.12. (R. 9, 15.) Taxpayer seeks to recover refund of this payment by the present suit (R. 15), dismissed by the courts below.

After the District Court granted summary judgment in favor of the Collector in the instant proceeding, and prior to the consideration of the case by the court below, taxpayer again moved that court to set aside its 1935 judgment. Taxpayer's motion was denied. 194 F. 2d 528. Earlier in the present term, this Court denied taxpayer's petition for certiorari to review that action. 344 U. S. 822 (No. 114, this Term.)

ARGUMENT

The courts below were clearly correct in holding this to be a repetitious suit involving the same cause of action which had already been finally and conclusively adjudicated against taxpayer by the Board and the Court of Appeals.[1] *Tait* v. *Western*

[1] The opinions of both tribunals establish that the question as to whether the stock had been held for more than two years was litigated and decided adversely to the taxpayer (memo-

Md. Ry. Co., 289 U.S. 620; *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598. By the specific provisions of Section 322 (c) of the Internal Revenue Code (Appendix, *infra*, p. 7), Congress intended to achieve finality in determinations by the Board of a taxpayer's liability for the particular year in controversy. A taxpayer has the option of litigating the legality of a deficiency either by appeal to the Tax Court before he pays, or by paying and thereafter suing to recover any overpayment; he may not choose both remedies, pursuing the latter *de novo* as if his claim had not already been determined by the outcome of the former.[2]

---

randum opinion of the Board, *Taylor* v. *Commissioner*, decided June 15, 1934 (1934 P-H B.T.A. Memorandum Decisions, par. 34,310, pp. 34-363-364), affirmed, 76 F. 2d 904, 906-907 (C.A. 2d).)

[2] Taxpayer's contention (Br. 9-10) that the instant case falls within the second exception stated in Section 322 (c) to its general rule (Appendix, *infra*, p. 7) is without merit. The decision of the Board which became "final" was its decision as affirmed by the Court of Appeals in 1935. Internal Revenue Code, Section 1140 (b) (2) and (c) (2). (Appendix, *infra*, pp. 8-9.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
I. HENRY KUTZ,
Special Assistants to the Attorney General.

APRIL 1953.

APPENDIX

Internal Revenue Code:

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(c) *Effect of petition to Board.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

* * * * *

(26 U.S.C. 1946 ed., Sec. 322.)

SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.

The decision of the Board shall become final—

* * * * *

(b) *Decision Affirmed or Petition for Review Dismissed.*—

* * * * *

(2) *Petition for Certiorari Denied.*—Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; * * *

* * * * *

(c) *Decision Modified or Reversed*—

* * * * *

(2) *Upon Mandate of the Circuit Court of Appeals.*—If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected

so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

* * * * *

(26 U.S.C. 1946 ed., Sec. 1140.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.322-7. *Limitations upon the Crediting and Refunding of Taxes Paid.*—

* * * * *

(d) *Overpayment determined by the Tax Court.*—In any case where a person having a right to file a petition with The Tax Court of the United States with respect to a deficiency in income tax imposed by chapter 1 filed such petition within the prescribed time, no credit or refund of the tax for the year to which the deficiency relates shall be allowed or made, and no suit for the recovery of any part of such tax shall be instituted by the taxpayer, subject to the following exceptions:

* * * * *

(4) Where the amount collected is in excess of the amount computed in accordance with the decision of The Tax Court which has become final, the excess payment shall be credited or refunded within the period of limitation provided in section 322 (b).

* * * * *

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